

FELDA PLANTATIONS SDN BHD

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v.

ARAB-MALAYSIAN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR

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ABDUL WAHAB PATAIL J

[CIVIL SUIT NO: D4-22-4-2001]

30 JANUARY 2008

CIVIL PROCEDURE: *Summary judgment - Application for - Security guarantee - Demand for monies owing - Effect of judgment or order of court - Whether letter of demand void and unenforceable - Cause to the contrary - Rules of the High Court 1980, O. 14, O. 42 r. 7(1)*

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CIVIL PROCEDURE: *Judgments and orders - Order of court - When judgment or order of court takes effect - Rules of the High Court 1980, O. 42 r. 7(1)*

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The plaintiff's claim in this case was for a sum of RM1,063,444.30, being the sum due and owing by the defendant to the plaintiff based on a security guarantee ('guarantee') issued by the defendant to the plaintiff. The plaintiff issued a letter of demand dated 23 December 1997 to the defendant for the sum due; the defendant failed to pay resulting in the plaintiff filing the present suit. The last paragraph of the guarantee set out that it expired on 31 December 1997. The defendant issued the guarantee to the plaintiff at the instance of one Bacom Marketing Sdn Bhd ('Bacom'). Bacom filed a suit against the plaintiff and obtained an *ex parte* interim injunction dated 22 December 1997 against the plaintiff restraining it from acting upon the guarantee, which was served on the defendant at its Kuching office by courier. The present case concerned the plaintiff's application for leave to enter summary judgment under O. 14 of the Rules of the High Court 1980 ('RHC'). The defendant relied upon O. 42 r. 7(1) of the RHC, submitting that at the time the demand for monies under the guarantee was made on 23 December 1997, the *ex parte* interim injunction order was already in force from the date of its pronouncement on 22 December 1997. The issue put before the court was to reconcile O. 42 r. 7(1) of the RHC that "A judgment or order of the court takes effect from the day of its date" with the general rule that a judgment or order requiring a

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- A person to do an act must specify the time after service of the judgment or order, or some other time within which the act is to be done.

Held (dismissing the application):

- B (1) The purpose of the requirement to specify the time after the service of the judgment or order, or some other time within which the act is to be done is: (a) to give the party a reasonable time to comply, and (b) upon failure to comply within that time, that party would have, in contempt
- C proceedings, no defence on grounds of lack of knowledge of the judgment or order. That is an entirely separate issue altogether from the question of when the judgment or the order of the court itself takes effect. Thus, assuming the plaintiff had no knowledge of the *ex parte* interim order, it
- D could not be held to be in contempt of the order; but since per O. 42 r. 7(1) of the RHC the order took effect from 22 December 1997 and it restrained the plaintiff from issuing any letter of demand against the guarantee, the letter of demand became void and unenforceable. The defendant's
- E knowledge as to whether the letter of demand was void and unenforceable or otherwise was irrelevant. Since the letter of demand was void and unenforceable, there was no obligation on the part of the defendant to honour it. Furthermore, there
- F was a dispute of fact that could not be resolved by findings upon the affidavit evidence before the court in this O. 14 proceeding. The defendant had thus succeeded in showing cause to contrary. The plaintiff had failed to demonstrate that the defendant had no defence. The plaintiff's application for leave to enter summary judgment under O. 14 of the RHC
- G must, therefore, be dismissed with costs. (paras 30, 31, 32 & 33)

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 42 r. 7(1)

- H **Other source(s) referred to:**

Halsbury's Laws of England, 4th edn, vol 37

*For the plaintiff/appellant - J Doshi (Nur Azlin Arifin with him);
M/s Abdullah & Zainudin*

- I *For the defendant/respondent - K Chelvi (BH Yap with her); M/s Mah-Kamariyah & Partners*

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail J:

[1] The claim by the plaintiff, Felda Plantations Sdn. Bhd., is for a sum of RM1,063,444.30 being the sum due and owing by defendant to the plaintiff based on a Security Guarantee issued by the defendant to the plaintiff *vide* Security Guarantee No. PG0006-KCH (the guarantee).

[2] The defendant had issued the guarantee:

That the Defendant irrevocably and absolutely guarantee that the sum of Ringgit Malaysia One Million Sixty-Three Thousand Four Hundred Forty-Four and Sen Thirty only (RM1,063,444.30) by way of a security deposit under the said contract shall be paid by the Defendant to the Plaintiff as per the following terms:- ...

[3] The guarantee was an on demand guarantee:

One Million Sixty-Three Thousand Four Hundred and Forty Four and Sen Thirty only (RM1,063,444.30) shall be paid by us forthwith ON DEMAND by you in writing without your having to assign any reason whatsoever for such Demand.

[4] Sub-paragraph (b) of the guarantee also provides that:

b) the said sum of Ringgit Malaysia One Million Sixty-Three Thousand Four Hundred and Forty Four and sen Thirty only (RM1,063,444.30) shall be paid to us forthwith to you irrespective of whether or not there is any dispute between the Contractor and yourselves (Felda Plantations Sdn. Bhd.) in respect of or relating to the said Contract or in respect of any other matter and irrespective of whether or not such said dispute, if any, has been settled, resolved, litigated or adjudicated upon or otherwise howsoever.

The Letter Of Demand

[5] The plaintiff had issued a letter of demand dated 23 December 1997 for the sum of RM1,063,444.30. It was despatched to the courier Skynet Worldwide (M) Sdn. Bhd. on 22 December 1997 for delivery to the defendant. The letter of demand was received by the defendant in Kuching on 23 December 1997. A copy of the letter of demand was faxed on 22 December 1997. The defendant failed to pay the plaintiff the said sum of RM1,063,444.30. The plaintiff had, therefore, filed this Civil Suit.

A Expiry Date Of The Guarantee

[6] The last paragraph of the guarantee sets out that it expires on 31 December 1997:

B NOTWITHSTANDING THE ABOVE, this Guarantee expires on 31st day of December, 1997 and any claim thereunder must be received in writing at this office by 31 December, 1997.

C **[7]** It is this expiry at the end of 31 December 1997 that makes it essential for the plaintiff to establish in this case that the letter of demand that it issued on 23 December 1997 was valid and enforceable.

The *Ex Parte* Injunction

D **[8]** The guarantee was issued by the defendant to the plaintiff at the instance of Bacom Marketing Sdn. Bhd. In Kuala Lumpur Civil Suit No. D1(D7)-22-1401-1997 filed by Bacom Marketing Sdn. Bhd., the plaintiff was named as the defendant. Bacom Marketing Sdn. Bhd. obtained an *ex parte* interim injunction on 22 December 1997. It was without the knowledge or presence of the plaintiff. The *ex parte* interim injunction against the plaintiff herein is as follows:

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- F** a. Restrained by itself or his servants or agents or otherwise and an injunction is given to restrain them or each one of them from serving a demand on the Bank Guarantee No. PG-0006-KCH dated 20 January 1997 in any manner whatsoever;
 - G** b. That the defendant is restrained by itself or its servants or agents in any manner and an injunction is hereby given to restrain each one of them from receiving any monies in any form which is paid by Arab-Malaysian Bank Berhad under the Bank Guarantee of Arab Malaysian Bank Berhad No. PG-0006-KCH dated 20 January 1997.

H **[9]** *Inter partes* hearing was fixed for 5 January 1998.

I **[10]** The sealed *ex parte* injunction order of 22 December 1997 was served on the defendant, Arab-Malaysian Bank Berhad, at its Kuching office by courier from Kuala Lumpur on 26 December 1997, and at its Kuala Lumpur office on 27 December 1997.

Enclosure 48**A**

[11] Enclosure 48 is an appeal by the defendant to the judge in chambers against the decision of the learned senior assistant registrar to grant leave to enter summary judgment under O. 14 of the Rules of the High Court 1980.

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[12] On 17 May 2005 the parties were directed to resubmit upon the terms of the guarantee, injunction of 22 December 1997 and the withdrawal.

[13] In resubmission it was submitted for the plaintiff, *inter alia*, as follows:

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In this case a demand on the Guarantee was made by the Plaintiff on 23rd December 1997 (see Enclosure 39 exhibit "A2"). The Defendant have in their Statement of Defence (at paragraph 6) admitted that a demand was made by the Plaintiff on 23rd December, 1997. The Defendant have also in their Affidavit In Reply (Enclosure 41) at paragraph 8 admitted that a demand was made on 23rd December, 1997. The Defendant then attempt to rely on exhibit KKK-2 to explain why payment was not made but if the said exhibit (KKK-2 an Order Court) is looked at it is a certified true copy which was only certified on 24th December, 1997 ie, a date after the demand was made and common sense would dictate that at the time of the demand such order was not ever served on the Defendant.

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[14] It was further submitted for the plaintiff that:

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A party can only be restrained upon service of the Order. The Plaintiff's Affidavit In Reply (Enclosure 43) exhibit "A-1" clearly shows that the Order was only served on the Plaintiff's Directors namely after the demand was also made (ie, 5 days after the demand had already been made by the Plaintiff) this is clear from paragraph 4 and 6 of exhibit "A-1". The Order was only served on the bank 4 days after the Defendant's liability had arisen which can also be seen from exhibit "A-1" (see paragraph 3).

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Therefore based on the terms and conditions of the Security Guarantee it can be seen that at all times when the Demand was made the Defendant bank was under a duty to pay the Plaintiff.

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[15] The grounds relied upon by the plaintiff in seeking leave to enter summary judgment are as follows:

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- A a) There was a security guarantee;
- b) The security guarantee was unconditional and irrevocable;
- c) Any dispute whether pending or settled would not affect and could not affect the issue of demand by the plaintiff and that
- B of payment by the defendant;
- d) A valid demand was made on 23 December 1997.
- e) The fact that a demand was made on 23 December 1997 is
- C an admitted fact.
- f) The plaintiff were perfectly within their right to make the demand;
- g) Neither the plaintiff nor the defendant knew of the order (in
- D the earlier suit) at the time the demand was made by the plaintiff and the liability of the defendant to pay forthwith arose as common sense and logic would dictate here;
- h) The defendant has not made or effected payment and
- E therefore the plaintiff is entitled to judgment on an O. 14 application.
- i) The defendant's appeal is therefore without merit and ought to be dismissed with costs.
- F [16] The point made for the plaintiff was that as the certified true copy of the injunction could not have been produced and served upon the defendant until 24 December 1997 at the earliest, the letter of demand from the plaintiff dated and served on 23 December 1997 was valid and enforceable. It was submitted that
- G for the purposes of the application for leave to enter summary judgment under O. 14 of the Rules of the High Court 1980, there are therefore no triable issues.

The Plaintiff's Arguments

- H [17] Objection was taken of the fact that the letter giving notice of the *ex parte* injunction stated it was obtained for an entity called Bacom Enterprises Sdn. Bhd. and not Bacom Marketing Sdn. Bhd.

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[18] Upon consideration the court is of the view that the material point is that notice was given of a court order, being an order of injunction to stop a call or demand upon the Security Guarantee. That such an order was obtained by a wrong party is immaterial at that point of time as an order of the court must be obeyed until it is set aside. The objection must therefore fail.

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[19] There is another issue raised. It is with regard to the fact that a copy of the letter of demand was faxed to the defendant on 22 December 1997.

[20] However, although the notice of demand upon the guarantee may have been received by fax on 22 December 1997, the fact the letter of demand was dated 23 December 1997 means that the time at which the faxed copy of the letter of demand was received on 22 December 1997 is irrelevant, and that as a demand it was effective only as from the first minute of 23 December 1997.

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[21] The plaintiff's argument in this case is that at the time the demand was made on 23 December 1997 upon the defendant, the plaintiff had no notice of the *ex parte* injunction obtained on 22 December 1997, and was therefore not prevented from issuing the letter of demand.

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[22] It was also submitted that since the certified true copy exhibited by the defendant was dated 24 December 1997, the earliest the defendant had the notice was on 24 December 1997. Further the sealed copy of the *ex parte* order was served only on 26 December in Kuching and 27 December 1997 in Kuala Lumpur. It was argued that the notice of demand made on the guarantee served on the defendant on 23 December 1997 was valid and enforceable, and the defendant had no reason not to honour it.

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The Defendant's Arguments

[23] The orders in the *ex parte* injunction of 22 December 1997 under Kuala Lumpur Civil Suit No. D1(D7)-22-1401-1997 were as follows:

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A bahawa Defendan dihalang secara sendiri atau melalui pekerja-pekerjanya atau ejen-ejennya atau sebaliknya dan suatu injunksi hendaklah dan dengan ini diberi untuk menghalang mereka atau setiap daripada mereka daripada menyerahkan tuntutan terhadap Jaminan Bank Arab-Malaysia Bank Berhad No. PG-0006-KCH yang bertarikh 20-1-1997 dalam apa cara sekalipun;

B bahawa Defendan dihalang secara sendiri atau melalui pekerja-pekerjanya atau ejen-ejennya atau sebaliknya dan suatu injunksi hendaklah dan dengan ini diberi untuk menghalang mereka atau setiap daripada mereka daripada menerima sebarang wang dalam apa cara sekalipun yang dibayar oleh Arab-Malaysia Bank Berhad No. PG-0006-KCH yang bertarikh 20-1-1997.

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DAN SELANJUTNYA bahawa pendengaran permohonan ini bagi Saman Dalam Kamar *inter partes* ditetapkan pada 5 haribulan Januari 1998 pukul 9.00 pagi iaitu tarikh tidak melebihi 14 hari daripada hari perintah ini.

[24] The defendant in Kuala Lumpur Civil Suit No. D1(D7)-22-1401-1997, is the plaintiff in this case. It was the plaintiffs who were restrained from serving a demand or receiving any proceeds.

E [25] The plaintiff never applied to set aside that order which remained effective until its expiry on 5 January 1998.

[26] Since the guarantee expired on 31 December 1997, the defendant was no longer under any obligation to pay after the expiry of the guarantee.

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[27] The defendant relied upon O. 42 r. 7(1) of the Rules of the High Court 1980:

G **Rule 7. Date from which judgment or order takes effect.**
(O. 42 r. 7)

1) A judgment or order of the Court takes effect from the day of its date

H 2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made ...

[28] It was submitted for the defendant that at the time the demand for the monies under the guarantee was made on 23 December 1997, the *ex parte* interim injunction order was already in force from the date of its pronouncement on 22 December 1997.

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[29] The issue put before the court is to reconcile O. 42 r. 7(1) that “A judgment or order of the court takes effect from the day of its date”, with the principle summarised in *Halsbury’s Laws of England*, 4th edn, vol 37 that: A

The general rule is that a judgement or order requiring a person to do an act must specify the time after service of the judgement or order, or some other time within which the act is to be done. B

Reconciliation Between The Principle And O. 42 r. 7

[30] The purpose of the requirement to specify the time after service of the judgement or order, or some other time within which the act is to be done is: (a) to give the party a reasonable time to comply, and (b) upon failure to comply within that time, that party would have, in contempt proceedings, no defence on grounds of lack of knowledge of the judgment or order. That is an entirely separate issue altogether from the question of when the judgment or the order of the court itself takes effect. Thus, assuming the plaintiff had no knowledge of the *ex parte* interim order of 22 December 1997, the plaintiff cannot be held to be in contempt of the order; but since per O. 42 r. 7(1) the order takes effect from 22 December 1997, and it restrained the plaintiff from issuing any letter of demand against the guarantee, the letter of demand becomes void and unenforceable. Knowledge of the defendant as to whether the letter of demand is void and unenforceable or otherwise is irrelevant. Since the letter of demand is void and unenforceable, there was no obligation on the part of the defendant to honour it. C D E F

[31] The defendant had submitted:

The Defendant/Appellant would refer to the paragraphs 9 and 10 of Enclosure 41 and would contend that the draft copy of the said Ex-Parte Injunction Order dated 22-12-1997 was served on the Defendant by M/s. Lee Hishammudin, solicitors for Bacom Marketing Sdn. Bhd. (Bacom’s solicitors), by facsimile on 23-12-1997. In fact on 23-12-1997 Bacom’s solicitors had sent the draft copy of the said Ex-Parte Order by facsimile to the Plaintiff thereby giving notice to the Plaintiff. These are facts which can only be proved during trial by calling the relevant parties to court to give evidence. G H

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- A [32] The above is not conceded by the plaintiff in submissions. It is a dispute of fact. The dispute cannot be resolved by findings upon the affidavit evidence before the court in this O. 14 proceeding. It requires the investigative and verification processes inherent in preparation for trial under a writ of summons to ensure the court has the facts right. That is cause to the contrary in an O. 14 application.
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- C [33] The defendant has succeeded to show cause to the contrary. The plaintiff has failed to demonstrate that the defendant has no defence. The plaintiff's application for leave to enter summary judgment under O. 14 of the Rules of the High Court 1980 must, therefore, be dismissed with costs.

Enclosure 55

- D [34] Enclosure 55 is case management. The parties came for case management on 15 November 2005. Further dates for case management were 6 February 2006 and 6 April 2006.

- E [35] Upon completion of case management, it is evident that the decisive issue between the plaintiff and the defendant remained the same. Resolution of the dispute set out in para 31 above in favour of the plaintiff would not improve the case for the plaintiff. Resolution in favour of the defendant would weaken the plaintiff's case but would help explain why the defendant did not act upon the letter of demand, but it would not appreciably strengthen the defendant's case. Setting down for trial to resolve that dispute serves no purpose. The issue that disposes of the action remains the same issue of law dealt with in the application under O. 14 of the Rules of the High Court.
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- G [36] On 9 August 2006 on final case management, the plaintiff's action was dismissed with costs for the same reason set out at para 30 above.

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